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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DIRECTV, INC.,

Plaintiff,

v.

Civil Action No. 3:03CV321

LARRY KEY,

Defendant.

MEMORANDUM OPINION

Plaintiff brought this action under the Federal Communications Act, alleging Defendant engaged in the unauthorized reception of satellite signals, the unauthorized interception of electronic communications, the possession of a pirate access device, and the use of a pirate access device. On August 5, 2003, Plaintiff moved to compel discovery, asserting that Defendant had failed to respond to Plaintiff's June 24, 2003 interrogatories and requests for production. Plaintiff filed a Notice of Hearing setting the matter for oral argument on August 21, 2003 at 10:00 a.m. Defendant did not respond to the motion to compel, nor did Defendant appear at the hearing.¹ The Court granted the Plaintiff's unopposed motion to compel and scheduled a sanctions hearing for August 29, 2003 at 10:00 a.m. At defense counsel's request, the hearing was rescheduled for August 27, 2003.

All counsel of record appeared before the Court on August 27, 2003. Plaintiff's counsel, Brian Pumphrey, informed the Court

¹ See *infra* p. 4, note 3.

that the costs associated with the motion to compel, minus the costs incurred by a partner reviewing his work, totaled \$3,400 to \$3,500. Defense counsel, Curtis Brown, adamantly denied receiving the discovery requests prior to August 7. He acknowledged that his secretary had signed a Federal Express receipt for a package from Plaintiff's law firm, but insisted it contained only a single piece of paper. Mr. Brown told the Court that he never received any phone calls or messages from Mr. Pumphrey prior to the motion to compel. Mr. Brown told the Court that only two people work in his office, himself and his secretary, M. Williams.

The Court informed counsel that, due to the divergent stories, an evidentiary hearing would be held on the matter and the attorneys' secretaries would have to testify. Both attorneys assured the Court that their secretaries would be present. Indeed, during oral arguments, Mr. Brown stated that Plaintiff should examine his secretary under oath. See Transcript of August 27, 2003, Hearing, p. 4. By Order entered September 4, 2003, the evidentiary hearing was scheduled for 9:00 a.m. on October 1, 2003, and counsel were ordered to attend and to produce all necessary witnesses.

Following the August 27 hearing, Defendant moved to vacate the Order granting the motion to compel. On September 11, 2003, Plaintiff filed a second motion to compel, arguing that Defendant's responses to the initial discovery requests were contradictory and his objections were untimely. Defendant failed to respond to the motion to compel. Both the motion to vacate and the motion to compel were noticed for the October 1 hearing.

The October 1 evidentiary hearing convened at 9:13 a.m. due to Mr. Brown's late arrival in the courtroom. In addition to a number of exhibits, Plaintiff presented the testimony of Mr. Pumphrey; Debbie Holcomb, Mr. Pumphrey's secretary; and Sharyn Mann, a senior operations manager with Federal Express in

Richmond. Defendant had no evidence.² Based on the evidence presented at the hearing, the Court makes the following findings of fact: -

1. On June 24, 2003, at the direction of Mr. Pumphrey, Debbie Holcomb sent Mr. Brown a cover letter, a request for production of documents, interrogatories, and Rule 26 initial disclosures in a package to be delivered by Federal Express.
2. The package weighed approximately six pounds.
3. The package was delivered to Mr. Brown's reception/front desk area on June 26, 2003 at 11:37 and was signed for by M. Williams.
4. M. Williams is Mr. Brown's secretary and the only employee in Mr. Brown's office.
5. On July 29, 2003, Mr. Pumphrey wrote and mailed a letter to Mr. Brown asking him for his responses to the initial discovery requests.
6. On July 29, 2003, Mr. Pumphrey also called Mr. Brown's office and left a detailed message with Mr. Brown's secretary, asking that Mr. Brown return the call because discovery was late.
7. On August 4, 2003, Mr. Pumphrey placed a second telephone call to Mr. Brown's office and left the same message with Mr. Brown's secretary.
8. On August 5, 2003, Mr. Brown called Mr. Pumphrey and told him that he had never received the discovery requests.
9. On August 6, 2003, a courier hand-delivered a letter from Mr. Pumphrey to Mr. Brown. The letter notified Mr. Brown of Plaintiff's motion to compel, listed the Court's available hearing dates, and requested Mr. Brown select a hearing date by August 7.

² Mr. Brown attempted to offer the affidavit of his secretary. The Court refused to accept the affidavit, as the Court had specifically instructed Mr. Brown to have his secretary present to testify. Mr. Brown's suggestion that he misunderstood the Court's order to produce his secretary is belied by the record and is simply one more misrepresentation to the Court. See Order, September 4, 2003; see also, Transcript of August 27, 2003 Hearing, pp. 4, 7, 10-11.

10. Mr. Pumphrey received no response from Mr. Brown, and on August 8, sent a second letter to Mr. Brown noticing the hearing for 10:00 a.m. on August 21, 2003.
11. Mr. Brown did not object to the hearing date, nor did he file a response to the motion to compel.
12. Mr. Brown did not appear at the August 21 hearing and made not reasonable effort to notify the Court or Plaintiff of his unavailability.³
13. Mr. Brown did not respond to the second motion to compel.
14. Mr. Brown made a material misrepresentation to the Court during oral argument and in his motion to vacate when he stated that he did not receive Plaintiff's discovery requests on June 26, 2003.
15. Mr. Brown received the discovery requests on June 26th and knowingly failed to timely respond to them.
16. As of October 1, 2003, Plaintiff had incurred \$9178 in fees and \$707.43 in costs in connection with the first motion to compel.

Rule 37 of the Federal Rules of Civil Procedure sets forth the consequences for failure to comply with discovery and authorizes the imposition of sanctions in cases in which there has been an abuse of the discovery rules. See Stillman v. Edmund Scientific Co., 522 F.2d 798, 801 (4th Cir. 1975). The Rule is flexible in its nature and a court has broad discretion in its choice of the type and degree of the sanctions to be imposed. Id. If a motion to compel is granted, "the court shall, after affording an opportunity to be heard, require the party ... whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion.

³ Following the hearing, the Court received a letter from Mr. Brown dated August 18, 2003, in which Mr. Brown stated that he was unavailable for the hearing due to previously scheduled matters and that Plaintiff had not cleared the hearing date with Mr. Brown prior to noticing the hearing. Mr. Brown's letter was not reasonably calculated to reach the Court or Mr. Pumphrey prior to the scheduled hearing. Moreover, contrary to Mr. Brown's representations, he was given an opportunity to select the hearing date but he failed to respond in a timely fashion.

including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified." Fed. R. Civ. P. 37(a)(4). The Fourth Circuit has enunciated a four-part test to use in determining what sanctions should be imposed under Rule 37: "[t]he court must determine (1) whether the non-complying party acted in bad faith, (2) the amount of prejudice that non-compliance caused the adversary, (3) the need for deterrence of the particular sort of non-compliance, and (4) whether less drastic sanctions would be effective." Belk v. Charlotte-Mecklenburg Bd. Of Educ., 269 F.3d 305 (4th Cir. 2001).

In determining the amount of monetary sanctions, the Court has considered Mr. Pumphrey's affidavits detailing his fees and costs associated with the first motion to compel as well as the affidavit of James W. Morris, III.⁴ The Court finds that Plaintiff's fees and costs are reasonable in light of the three court appearances on Plaintiff's behalf, the necessary engagement of another attorney to conduct the evidentiary hearing so that Mr. Pumphrey could testify, and the necessary preparation of production of correspondence, briefs, affidavits, exhibits and witnesses. It is clear to the Court that Mr. Brown acted in bad faith and prejudiced Plaintiff when he failed to respond to Plaintiff's discovery requests, telephone calls, and letters; failed to appear for the August 21st hearing; failed to produce his secretary for examination on October 1; and made material misrepresentations to the Court. Mr. Brown had a number of opportunities to remedy his errors and misrepresentations, and he chose not to do so. Clearly, Mr. Brown's egregious behavior warrants deterrence, and the Court finds that nothing less than a full award of Plaintiff's fees and costs would be effective.

⁴ Three affidavits from Mr. Pumphrey were filed with the Court. In updating his fees and costs, Mr. Pumphrey submitted Mr. Morris' affidavit as well as two more of his own which, although not actually filed with the Court, were copied to Mr. Brown via Federal Express. The Court finds that Mr. Brown had sufficient notice of the affidavits and has therefore considered all of them.

The Court has reviewed Plaintiff's second motion to compel. Defendant's objections are untimely, and the time for objections expired fifteen days after the receipt of discovery on June 26, 2003. Moreover, the Court finds that Defendant has provided inconsistent and incomplete answers to the interrogatories. Plaintiff's second motion to compel will be granted, and Defendant will be ordered to amend his responses to the discovery requests as detailed in the second motion to compel.

Virginia Rule 3.3, Candor Toward the Tribunal, states in part that "[a] lawyer shall not knowingly make a false statement of facts or law to a tribunal." Virginia Rules of Professional Conduct, Rule 3.3. Rule 83.1(l) of the Local Rules of the United States District Court for the Eastern District of Virginia adopts the Virginia Rules as the ethical standards relating to the practice of law in this Court. Mr. Brown made misrepresentations of fact to this Court in violation of Rule 3.3 and Rule 83.1(l). Accordingly, the Court finds it necessary to refer the matter to the Virginia State Bar for further disciplinary proceedings, as appropriate, and shall do so forthwith.

Plaintiff's motion for sanctions will be granted in the amount of \$9885.43 to be paid by Mr. Brown personally. Defendant's motion to vacate will be denied, based not only on the Court's factual findings but also on counsel's failure to file a response to the motion to compel, failure to appear for oral argument on the motion to compel, and failure to submit a brief in support of his motion to vacate as required by the Local Rules. Mr. Brown's egregious conduct in the case at bar has seriously jeopardized whatever defenses his client may have had. If Defendant wishes to submit a motion to substitute counsel, or even to proceed pro se, the Court will give it due consideration.

Let the Clerk send a copy of the Memorandum Opinion and accompanying Order to Defendant, the Virginia State Bar, and all counsel of record.

App. 7

s/David G. Lowe
United States Magistrate Judge

Richmond, Virginia

Date: Oct 17, 2003

FILED Oct 17 2003
CLERK, U.S. DISTRICT COURT
RICHMOND, VA
K.S.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DIRECTV, Inc.,

Plaintiff,

v.

Civil Action No. 3:03CV321

LARRY KEY,

Defendant.

MEMORANDUM OPINION

On December 31, 2003, the Court issued an order granting Plaintiff's motion to voluntarily dismiss this action with prejudice and denying Defendant's motion for summary judgment. On January 8, 2004, Defendant moved to set aside the judgment and recuse the undersigned. The Court heard oral argument on the motion on January 21, 2004.

In his motion, Defendant argues that the entry of any order following the Court's filing a bar complaint would be improper. At oral argument Defendant further argued that because the undersigned previously sanctioned defense counsel in this matter, the case should be reassigned to another judge.

Title 28 U.S.C. § 455 provides that any magistrate judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. 28 U.S.C. § 455. The alleged bias must derive from an extra-judicial source; that is, the nature of the judge's bias must be personal, not judicial. *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). Moreover, opinions formed by the judge on the basis

of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or impartiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Liteky v. United States, 510 U.S. 540, 555 (1994). Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. Id.

A motion to recuse must be made in a timely fashion. A motion made after the disposition of the case but based on facts known well before that time is untimely. See United States v. Owens, 902 F.2d 1154 (1990) (recusal motion untimely when defendant knew the basis of motion before he pled, but chose to wait until after the court sentenced him to move for recusal).

Defendant has not alleged a bias arising from an extra-judicial source. Defendant complains that the Court's order imposing sanctions against counsel noted that counsel's actions had potentially jeopardized the defense in this case. The Court's statement was an accurate statement of the law. See Fed. R. Civ. P. 37. Defendant was unable to cite the Court to a single case requiring recusal when a bar complaint or judicial complaint had been filed during the course of litigation. Moreover, Defendant was aware of the facts supporting his allegation of bias on October 17, 2003, but chose not to move for recusal until months later, after his motion for summary judgment was filed and denied.

Defendant does not dispute that the dismissal of Plaintiff's case with prejudice causes him no substantial prejudice. Nor does Defendant dispute that his motion for summary judgment was inadequate. Instead, Defendant's motion to set aside complains that the Court made no provisions for costs incurred by Defendant in the course of this litigation. To date, Defendant has failed to file an appropriate bill of costs in compliance with Local Rule 54, 28 U.S.C. § 1920 or 28 U.S.C. § 1924.

App. 10

For the foregoing reasons, as well as those stated from the bench, Defendant's motion to set aside and recuse will be DENIED. Let the Clerk send a copy of this Memorandum Opinion and accompanying Order to all counsel of record.

s/ David G. Lowe
UNITED STATES MAGISTRATE JUDGE

Richmond, Virginia
Date: Jan 30, 2004

FILED JAN 30 2004
CLERK, U.S. DISTRICT COURT
RICHMOND, VA
K.S.

App. 11

JUDGMENT

FILED: June 8, 2005

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 04-1256
CA-03-321

DIRECTV INCORPORATED

Plaintiff – Appellee

v.

LARRY KEY

Defendant – Appellant

Appeal from the United States District Court for the
Eastern District of Virginia at Richmond

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

App. 12

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-1256

DIRECTV INCORPORATED,

Plaintiff – Appellee,

versus

LARRY KEY,

Defendant – Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. David G. Lowe, Magistrate Judge. (CA-03-321)

Submitted: May 27, 2005

Decided: June 8, 2005

Before WILLIAMS, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Curtis T. Brown, LAW OFFICES OF CURTIS T. BROWN, Norfolk, Virginia, for Appellant. Elizabeth F. Edwards, Brian E. Pumphrey, MCGUIRE WOODS LLP, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Larry Key appeals the magistrate judge's orders imposing sanctions against Key's counsel for discovery abuses.* We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. See DIRECTV, Inc. v. Key, No. CA-03-321 (E.D. Va. Oct. 17 & Dec. 31, 2004). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and arguments would not aid the decisional process.

AFFIRMED

* The parties consented to the jurisdiction of the magistrate judge.

①
No. 05-737

JAN 9 - 2006

OFFICE OF THE CLERK

**In The
Supreme Court of the United States**

LARRY KEY,

Petitioner,

v.

DIRECTV, INC.,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Anne Marie Whittemore, Esq.
Elizabeth F. Edwards, Esq.
Brian E. Pumphrey, Esq.*
**Counsel of Record*
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
Telephone: (804) 775-1000
Facsimile: (804) 775-1061

Counsel for Respondent

Questions Presented

Whether the Court should review a fact-specific application of the standard for imposing sanctions under Federal Rule of Civil Procedure 37(a)(4), as set forth by the Court of Appeals for the Fourth Circuit in *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305 (4th Cir. 2001), in a case where the District Court found that counsel for the Petitioner acted in bad faith by intentionally failing to respond to discovery requests and by making material misrepresentations to the District Court.

Whether the Court of Appeals for the Fourth Circuit correctly affirmed the imposition of sanctions on counsel for the Petitioner under Federal Rule of Civil Procedure 37(a)(4) for bad faith litigation misconduct and for making material misrepresentations to the District Court.

ii.

Corporate disclosure statements were filed in the United States Court of Appeals for the Fourth Circuit in the Brief for Plaintiff-Appellee.

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Table of Cited Authorities

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<i>Chambers v. NASCO, Inc.</i> , 501 U.S. 32 (1991).....	4-5
<i>Cunningham v. Hamilton County, Ohio</i> , 527 U.S. 198 (1999)	4
<i>Roadway Express, Inc. v. Piper</i> , 447 U.S. 752 (1980)	4

Other Authorities

Federal Rule of Civil Procedure 37.....	<i>passim</i>
Supreme Court Rule 10.....	2-4

Statement of the Case

This case is about sanctions imposed against an attorney who knowingly failed to respond to discovery requests on behalf of his client, and then "made material misrepresentations" of fact to a federal magistrate judge regarding whether he received the discovery requests in the first instance.

The discovery requests at issue were served on Curtis T. Brown ("Mr. Brown"), counsel for the Petitioner, in late June 2003. After receiving no objections or responses, counsel for Respondent DIRECTV, Inc. ("DIRECTV"), Brian E. Pumphrey ("Mr. Pumphrey"), wrote three letters and made two phone calls to Mr. Brown asking for discovery responses. After all but one of these attempts at communication were ignored, DIRECTV filed a motion to compel. Mr. Brown failed to oppose the Motion to Compel and did not appear at the hearing to argue the motion on his client's behalf.

Having prevailed on the Motion to Compel, DIRECTV filed a Motion for Sanctions pursuant to Federal Rule of Civil Procedure 37(a)(4). Mr. Brown opposed the Motion, claiming that he never received the discovery requests. He also represented to the District Court that his secretary could corroborate his claim. Recognizing the wide gap in Mr. Pumphrey's and Mr. Brown's respective versions of events, the District Court scheduled an evidentiary hearing and ordered the attorneys to appear and produce their secretaries for examination.

At the evidentiary hearing, Mr. Brown failed to produce his secretary or put on any evidence. DIRECTV produced Mr. Pumphrey, his secretary and a representative

from Federal Express. These individuals provided sufficient evidence to demonstrate that Mr. Brown received the discovery requests on June 26, 2003 and knowingly failed to respond to them.

Accordingly, on October 17, 2003, the District Court granted the Motion for Sanctions and ordered Mr. Brown to reimburse DIRECTV for the fees and costs it incurred in compelling the discovery responses.

Subsequently, DIRECTV moved to dismiss its complaint against the Petitioner with prejudice. On December 31, 2003, the District Court granted DIRECTV's Motion – which the Petitioner had inexplicably opposed – and incorporated the award of sanctions in the dismissal order. The Petitioner appealed.

On June 8, 2005, the U.S. Court of Appeals for the Fourth Circuit, in an unpublished *per curiam* opinion, affirmed for the reasons stated by the District Court.

Reasons for Denying the Petition

Pursuant to Supreme Court Rule 10, a “petition for a writ of certiorari will be granted only for compelling reasons.” Rule 10 also describes the “character of the reasons the Court considers” when reviewing a Petition. The Petitioner has failed to set forth any basis justifying the granting of a writ in this case.

A. This Court Should Decline to Review the Court of Appeals' Decision Affirming the Fact-Specific Application of its Standard for Imposing Sanctions Under Rule 37(a)(4).

The Petitioner asks this Court to reverse the decision of the Court of Appeals because the District Court "did not consider the four-part test [set forth in *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 348 (4th Cir. 2001)] as required in determining what sanctions to impose under the Rule." (Petition at 5.) This argument is facially invalid because the District Court did, in fact, apply that four-part test. (See Petition Appendix at 4-6.)

The Petitioner also contends that the District Court's findings of fact that Mr. Brown "acted in bad faith and prejudiced [DIRECTV] when he failed to respond to [DIRECTV's] discovery requests, telephone calls, and letters; failed to appear for the August 21st hearing; failed to produce his secretary for examination on October 1; and made material misrepresentations to the Court" are insufficient to justify sanctions under Rule 37(a)(4). (Petition at 4.)

In other words, the Petitioner is asking this Court to review the factual findings of the District Court, and to determine whether that court *misapplied* the Court of Appeals' test under *Belk*.¹ Because a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a

¹ The Petitioner does not challenge the validity of the Court of Appeals' four-part test, as stated in *Belk*.

properly stated rule of law,” Supreme Court Rule 10, the Petition should be denied.

B. The Court of Appeals Correctly Affirmed the Imposition of Sanctions Against Mr. Brown for Bad Faith Litigation Misconduct and for Making Material Misrepresentations to the District Court.

The Petitioner’s other argument is based on the demonstrably false premise that counsel for a prevailing party cannot be sanctioned under Rule 37(a)(4) for bad faith litigation misconduct and for lying to a magistrate judge. According to the Petitioner, because DIRECTV ultimately dismissed its claims against him, Mr. Brown’s “delay ... in providing the discovery responses [to DIRECTV]” did not prejudice DIRECTV, and therefore the Court of Appeals committed error in affirming the District Court’s imposition of sanctions. (Petition at 3-4.) The Petitioner cites no authority in support of this argument. No such authority exists.

In fact, the Petitioner’s argument is directly contrary to the established precedent of this Court. This Court has recognized that the purpose of sanctions under Rule 37 is “to protect courts and opposing parties from delaying or harassing tactics during the discovery process.” *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 208 (1999); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980) (stating that Rule 37 sanctions must be applied to penalize those whose conduct may be deemed to warrant such a sanction); *cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (recognizing that a federal court has the inherent authority to assess attorneys’ fees when an

attorney has acted in bad faith, vexatiously, wantonly or for oppressive reasons).

Because the Petitioner has failed to articulate any reason why this Court should engraft a wholly illogical and counterintuitive exception to Rule 37, and because no court has ever adopted the Petitioner's construction of that Rule, the Court should deny the Petition.

Conclusion

For the foregoing reasons, DIRECTV respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Anne Marie Whittemore, Esq.
Elizabeth F. Edwards, Esq.
Brian E. Pumphrey, Esq.
McGuireWoods LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000
Counsel for DIRECTV, Inc.